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IN THE

Supreme Court of the United States

October Term, 1993

LIBERTY LAKE INVESTMENTS, INC.

Petitioner,

v.

HARRY F. MAGNUSON, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the presence of misrepresentations and ethical abuses deprives litigation of First Amendment immunity and brings it within the sham exception to the *Noerr-Pennington* doctrine? *See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1929 n.6 (1993).

2. Whether it was error under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1930 (1993), for the antitrust court to grant summary judgment dismissing a suit under Sherman Act § 1: (1) where the anticompetitive conduct in question included pursuit of putative "environmental" litigation in state court; (2) where the antitrust court held as a matter of law that the "environmental" litigation was brought with probable cause; but (3) where the state court — in reviewing the predicate facts of the underlying legal proceeding and dismissing the "environmental" suit on the merits — had previously held that

> [The evidence] is insufficient to allow any reasonable trier of fact to conclude that . . . [the environmental] concern is based on anything more than speculation or conjecture;

and

> [A] review of [the] evidence leads the court to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition.

and; (4) where the suit which injured petitioner was one of three "environmental" lawsuits used to preclude market entry

of new shopping center competition by certain respondents (some of whom themselves lacked standing and were not named parties in the "environmental" suit).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

LIST OF PARTIES AND RULE 29.1 LIST vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

A. Statement of Facts. 3

B. Prior Proceedings. 16

REASONS FOR GRANTING THE WRIT 16

CONCLUSION 26

APPENDICES:

Appendix A: Opinion of the United States Court of Appeals for the Ninth Circuit (December 16, 1993).

Appendix B: Order Granting Summary Judgment of the United States District Court for the Eastern District of Washington (March 10, 1992).

TABLE OF AUTHORITIES

Cases:	Page(s)
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	3, 19
City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) . .	16-17
Clipper Exxpress v. Rocky Mt. Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983)	19
Concerned Olympia Residents v. City of Olympia, 33 Wn. App. 677, 657 P.2d 790 (1983)	23
Coughlin v. Seattle School Dist., 27 Wn. App. 888, 621 P.2d 183 (1980)	24
Crossman v. County of Spokane, No. 86-2-01407-6 (filed April 24, 1986)	13
Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	3
Eastlake Com. Co. v. Roanoke Assoc., Inc., 82 Wn.2d 475, 513 P.2d 36 (1973) .	23
Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830 (9th Cir. 1980)	3
Freedom From Religion Foundation, Inc. v. Zielke, 845 F.2d 1463 (7th Cir. 1988) .	9
Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983)	17-18

In re Burlington Northern Inc., 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) 24-25

Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972) 20

Kravco Co. v. Valley Forge Center Assoc., 1992-1 Trade Cas. (CCH) ¶ 69863 (E.D. Pa. 1992) 3

Landmarks Holding Corp. v. Bermant, 664 F.2d 891 (2d Cir. 1981) 3, 24

Premier Elec. Const. Co. v. N.E.C.A., Inc., 814 F.2d 358 (7th Cir. 1987) 17

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 944 F.2d 1525 (9th Cir. 1991), *aff'd*, 113 S. Ct. 1920 (1993) 21

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 113 S. Ct. 1920 (1993) 18-19, 23

Riegel v. County of Spokane, 31 Wn. App. 1038 (1982) 12

Ross v. Bremer, 1982-2 Trade Cas. (CCH) ¶ 64746 (W.D. Wash. 1982) 3, 19-20

St. Joseph's Hosp. v. Hospital Corp. of America, 795 F.2d 948, *reh. denied*, 801 F.2d 404 (11th Cir. 1986) 19

TRW Financial Systems, Inc. v. Unisys Corp., 835 F. Supp. 994 (E.D. Mich. 1993) 19

Transkentucky Transportation R.R. v. Louisville R.R. Co., 581 F. Supp. 759 (E.D. Ky. 1983) 20

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 3

United States v. S.C.R.A.P., 412 U.S. 669 (1973) 23

Utility Reform Project v. B.P.A., 869 F.2d 437 (9th Cir. 1989) 23-24

Warth v. Seldin, 422 U.S. 490 (1975) . . . 9, 24

West 514, et al. v. County of Spokane, No. 87-2-01106-7 (filed April 9, 1987), *aff'd on appeal*, 53 Wn. App. 838, 770 P.2d 1065, *rev. denied*, 113 Wn.2d 1005, 777, P.2d 1050 (1989) 5, 11

Constitution, Statutes and Regulations:

United States Const. amend. 1 2

15 U.S.C. § 1 2

15 U.S.C. § 15(a) 2

28 U.S.C. § 1254(1) 2

Wash. Rev. Code Ch. 7.16 (1992) 9

Wash. Rev. Code Ch. 43.21C (1983) 5, 10

Wash. Admin. Code (WAC) Ch. 197-11 10-11

Treatises:

P. Areeda & H. Hovenkamp, *Antitrust Law* (1993 Supp.) 24

R. Bork, *The Antitrust Paradox* (1978) 17

LIST OF PARTIES AND RULE 29.1 LIST

The Petitioner is Liberty Lake Investments, Inc. ("LLII"), and the Respondents are Harry F. Magnuson, University City, Inc., Orville Barnes, McCarthy Management and Development Co., Antone and Sundena Plese, Larry Lyden and West 514, Inc.

Petitioner LLII, a Washington corporation, is wholly owned by William E. Boeing, Jr.; John and David Fluke; Luke G. Williams, Jr.; and Donald Sherwood. LLII is not associated, as parent or subsidiary, with any publicly traded or privately held corporation.

IN THE
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OCTOBER TERM, 1993

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 12 F.3d 155 (1993) and is reprinted as Appendix A. The Order Granting Summary Judgment of the United States District Court for the Eastern District of Washington is not reported and is reprinted as Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 16, 1993; LLII's timely petition for rehearing was denied on March 4, 1994.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution amend. 1, provides in pertinent part:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.

The Sherman Act § 1, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust . . . or conspiracy in restraint of trade . . . is hereby declared to be illegal . . . .

The Clayton Act § 4(a), 15 U.S.C. § 15(a), provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . .

STATEMENT OF THE CASE

This case invokes the sham exception to the *Noerr-Pennington* doctrine.[1] It concerns the misuse of litigation by a shopping center owner and developer to preclude entry of new competition.[2]

A. Statement of Facts.

In 1976 the Wells B. McCurdy Trust, a predecessor to Liberty Lake Investments, Inc. ("LLII"), held property at Liberty Lake, Washington, intending to develop a major regional shopping center there. Liberty Lake is located on Interstate 90 in the Spokane valley, between Spokane, Washington, and Coeur d'Alene, Idaho. The trustee, Wells McCurdy, was an experienced shopping center developer and manager. The trust proceeded to develop the property into a regional mall site. Development steps included, among many other things, obtaining necessary permits and zoning, establishing utility service, obtaining a lease commitment from a major department store, the Bon Marche ("the Bon"), negotiating with other potential anchor tenants, applying for grading permits and designing the regional mall.

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[1] *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

[2] A number of shopping center antitrust cases involving sham litigation have been reported. *See, e.g., Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981); *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830 (9th Cir. 1980); *Kravco Co. v. Valley Forge Center Assoc.*, 1992-1 Trade Cas. (CCH) ¶ 69863 (E.D. Pa. 1992); *Ross v. Bremer*, 1982-2 Trade Cas. (CCH) ¶ 64746 (W.D. Wash. 1982). In each of these cases, the lower court rejected summary disposition of the action.

LLII was formed in December 1986 by several of the trust beneficiaries (William E. Boeing, Jr., John and David Fluke, Luke Williams and Donald E. Sherwood), and it acquired the Liberty Lake site from the trust on July 10, 1987, after the respondents' actions caused the financial collapse of the trust. The trust assigned all of its rights in the property and choses in action to LLII.

University City, Inc. is a Washington corporation which owns the University City shopping center in Spokane. By 1980, University City had announced plans to renovate and expand its existing University City shopping center. University City also had acquired (by 1984) a site in Coeur d'Alene, Idaho (which is on Interstate 90), on which it hoped to develop a regional shopping mall. Both University City properties would have competed directly with the proposed Liberty Lake mall. Harry F. Magnuson is an officer and substantial shareholder of University City, Inc. McCarthy Management & Development Co. manages the University City shopping center, as well as several other shopping centers in the Spokane area. Orville Barnes is the president of McCarthy Management, and is also an officer of University City. Antone and Sundena Plese are former shareholders of University City, and Antone Plese was an officer.

When the trust began development of the Liberty Lake site, Magnuson, fearing the effect a mall at Liberty Lake would have on University City, on the proposed University City expansion, and on the Coeur d'Alene project, tried to persuade major tenants not to go to Liberty Lake, but rather to locate or stay at University City or locate at Coeur d'Alene. Nevertheless, development of the Liberty Lake site proceeded, and on September 29, 1986, the trust and the Cafaro Company, of Youngstown, Ohio, one of the leading and most fiscally sound shopping mall development

companies in the United States, entered into an agreement to develop the Liberty Lake mall.[3]

On January 8, 1987, after a public hearing, the Spokane County Hearing Examiner Committee approved the site plan for the project. No person or organization with expertise opposed the site plan approval.[4] On January 19, 1987, the last day possible to do so, Magnuson and Barnes — not having the credibility or standing required to bring the suit themselves — caused the commencement of "environmental" litigation (the "*West 514*" suit).[5] The litigation challenged the environmental impact statement for the project under the Washington State Environmental Policy Act ("SEPA").[6] The *West 514* suit, through its pendency alone, successfully blocked development of the Liberty Lake mall.

By recruiting straw parties to file suit (Darlene Compton and Larry Lyden, who joined the Pleses as plaintiffs), by paying all legal costs and fees, and by managing

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[3]Under the agreement, Cafaro was to pay $10 million to LLII. Cafaro would take title to the Liberty Lake mall site and Cafaro and LLII would jointly own the land adjoining the shopping center site, the value of which would be enhanced by its proximity to a major regional shopping center. Later discussions between LLII and Cafaro addressed equity participation by LLII in the center.

[4]To the contrary, petitions containing some 22,000 signatures were submitted by citizens supporting the Liberty Lake mall project. These consumers perceived the mall as beneficial, and viewed the obstruction of it as injurious to their welfare.

[5]*West 514, et al. v. County of Spokane*, No. 87-2-01106-7 (filed April 9, 1987), *aff'd on appeal*, 53 Wn. App. 838, 770 P.2d 1065, *rev. denied*, 113 Wn.2d 1005, 777 P.2d 1050 (1989).

[6]Wash. Rev. Code Ch. 43.21C (1983).

and controlling the litigation to suit their goals, Magnuson and Barnes were able to tie up the project, prevent Cafaro from closing on the purchase and sale agreement, and delay construction to the point that anchor tenants abandoned their commitments to the Liberty Lake mall.

The commencement of *West 514* meant that approval of the project was not final. Despite the obvious weakness of the environmental challenge, Cafaro was not willing to close on the agreement until final approval was obtained. Moreover, until government approval was final, construction on the site could not begin. The delay in construction caused by the pendency of the litigation, and the uncertainty as to when final approval would be obtained, made prospective tenants hesitant, and eventually led the Bon to terminate its commitment to the Liberty Lake mall. These factors — all of them a direct result of the *West 514* litigation — led to the demise of the Liberty Lake mall.

The anticompetitive purpose of the *West 514* suit and Harry Magnuson's intention to block the Liberty Lake mall are well documented in the record. The *West 514* litigation had nothing whatsoever to do with environmental concerns; it was, from inception, simply a powerful weapon to accomplish respondents' desires to (in their own words) "stifle," "sidetrack," "shut down," "stop" and "head off" development of the Liberty Lake mall.

Efforts to stir up the *West 514* suit against Liberty Lake mall were undertaken by Harry Magnuson himself, who placed telephone calls, at a minimum, to R. A. Hanson (another shopping center developer, and a direct competitor of Magnuson's), and Basil Vyzis (another developer and at that time a co-owner of Frederick & Nelson and the Crescent, two major department stores).

According to R. A. Hanson, Mr. Magnuson asked Mr. Hanson for his support in the effort to stop Liberty Lake:

> Harry Magnuson called me up one day and asked me to join him in this effort, and I about fell out of my chair[.] . . .
>
> [H]e made some remarks like — well, he asked me very pointedly to join him, help him in this effort . . . but he also made some comments about, "Well, I realize that we're competitors in one place, but we're together on this," trying to talk me into it. . . .
>
> He said, "We have to stop this thing." . . .
>
> *[H]e was going to get somebody to see somebody who had standing to make this appeal. . . .*
>
> *I understand that through the appeal and legal processes, you can, you know, greatly delay something. "Stop" is probably not accurate; someday you can effectively stop something if you can delay it long enough.*

(Emphasis added.) Magnuson also telephoned Basil Vyzis, apparently for the same purpose. A message slip produced by Vyzis reads in part: "Harry Magnuson — Liberty Lake Shopping — Planning and Zoning Approved — Jan. 8th — Mon. [January 19, 1987] last day to appeal — trying to find someone to file the appeal."

At the same time, Orville Barnes was hurriedly trying to find straw-parties with standing to appeal. He approached

two individuals with whom he had business relationships — Darlene Compton and Larry Lyden — and convinced them to act as plaintiffs in the litigation. Darlene Compton was approached by Barnes to oppose Liberty Lake because, as Barnes told her: "'[W]e' need somebody who owns property downtown." Barnes convinced Compton that Liberty Lake mall would mean financial disaster for her. Lyden was the owner and tender of a bar (located in Compton's building) in which Orville Barnes had had a financial interest. Barnes promised Compton and Lyden that all of their legal fees and expenses would be taken care of, if they would sue LLII. Compton, Lyden (through West 514) and Antone and Sundena Plese, who were University City stockholders, became the plaintiffs in the *West 514* litigation.

Once Magnuson and Barnes had their straw-parties in place, the prosecution of *West 514* was turned over to University City's lawyers, who acted under the immediate direction primarily of Orville Barnes. (University City's lawyers are associated with the firm in which Harry Magnuson's brother, Robert Magnuson, is a senior partner.) The individual attorneys responsible for the case were paid by University City. Randall Gaylord, who did most of the day-to-day work on the *West 514* suit, was a first-year associate. Very early on he apparently had no knowledge that University City was funding the litigation; in fact, he had been told by partners in his firm that *West 514* was a *pro bono* case.

The *West 514* litigation actually began with the filing of an appeal of the Hearing Examiner's decision to the Spokane County Board of Commissioners. The Board denied the appeal, issuing its findings and conclusions on March 10, 1987. The Board's decision was appealed to the Spokane County Superior Court, and eventually litigated through the

full appellate process; the *West 514* suit did not end until June 1989. It was everywhere unsuccessful on the merits.[7]

The state trial judge who decided the *West 514* suit made express findings that the issues behind the *West 514* suit were not within the ambit of the SEPA statute, and were excluded from consideration under the SEPA regulations.

In his March 7, 1988 opinion on the merits of *West 514*, Spokane County Superior Court Judge Michael E. Donohue affirmed approval of the Liberty Lake mall. This decision was based upon a full review of the certified record of proceedings before the Board of County Commissioners, a record which had not been before him when he rendered his standing decision.[8] Judge Donohue held that the

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[7]Although the superior court made an initial determination that the *West 514* plaintiffs had standing under SEPA, it later concluded that even the *purported* interests at stake (i.e., Compton's, Lyden's and the Pleses') were economic, not environmental. (At the time the superior court determined that the *West 514* plaintiffs appeared to have had standing — thereby allowing the case to proceed — it had not been advised that one of the plaintiffs had asked to withdraw from the case; nor did it know that the real parties behind the lawsuit, who had no standing to bring *West 514*, were simply seeking to block entry of new competition through the pendency of the suit.)

[8]In deciding the issue of standing on June 3, 1987, Judge Donohue determined only that a writ should issue under Wash. Rev. Code Ch. 7.16 *et seq.*, based on bare allegations which he later determined had not been substantiated. In other words, Judge Donohue decided nothing more than that the pleadings and affidavits facially appeared to entitle the petitioners to have the court decide the merits of the dispute. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988). The affidavits later proved to be deceptive. One had been submitted for Darlene Compton, who already had advised her counsel that she no longer wished to be a party to the suit. Another affidavit, that of Dr. Larry Esvelt, stated that the Liberty Lake mall project "will" contaminate the Spokane aquifer.

petitioners' environmental claims were a pretext asserted to protect their economic interests:

> WAC 197-11-449(3) exempts "economic competition" and "profits" issues from the areas to be addressed in environmental impact statements. The legislature has restricted the use of SEPA to "natural" or "built" elements of the environment. RCW 43.21C.110(f). From the materials provided, it is clear that the intent of the legislature was to leave no doubt that concerns such as business competition or potential consumer flight from one commercial center to another was not an environmental consideration under SEPA.
>
> The body of material before the Board pertaining to the issue of economic blight is insufficient to allow *any reasonable trier of fact* to conclude that such a concern is based on anything more than speculation or conjecture. *Moreover, a review of that evidence leads the court to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition.*

The court stated further that the "environmental" evidence was unpersuasive and speculative and fell "far short of scientific probability or likelihood". In its affirmance, the Washington Court of Appeals wrote:

Later, however, after reviewing the certified record, Judge Donohue found that Dr. Esvelt's actual opinion was speculation and fell far short of the degree of certainty necessary to require the preparation of a Supplemental Environmental Impact Statement.

> There is no doubt that a large mall in the Liberty Lake area will compete economically with downtown Spokane as well as other area retail centers. *But economic competition, in and of itself, is not an environmental effect and need not be discussed in an EIS. WAC 197-11-448(3).*

The Washington Supreme Court thereafter denied review. 113 Wn.2d 1005, 777, P.2d 1050 (1989). Clearly the state courts found *West 514's* environmental concerns baseless.

University City, Magnuson and Barnes and their counsel ensured that the *West 514* litigation — despite having no basis in fact or law — continued for some 2½ years.

The parties behind *West 514* protracted it by prosecuting the case in the name of an unwilling litigant. Not long after *West 514* had commenced, Darlene Compton learned that the real parties in interest behind the suit were concerned only with protecting their financial well-being, and promptly requested that her name be removed from the lawsuit. Compton made repeated attempts to get out. In her first letter, dated May 8, 1987 — before Judge Donohue decided the standing issue — she told Randy Gaylord that the use of her name on the lawsuit was "neither appropriate nor desirous," and noted that the case appeared to be about "Orville [and] his competitors." Despite her demand to be extricated from it, her name continued to be used in the lawsuit; and Compton made further requests to withdraw. Instead of acting on Compton's request, Gaylord merely forwarded her letters to his superiors. Ultimately Compton met with the University City lawyers; she was pressured by them to stay in; but she did not yield to this pressure and maintained her desire for withdrawal. Finally, Compton received a telephone call from Orville Barnes, who told her

that her name, once on the suit, could not be removed. *West 514* was prosecuted to conclusion using her name.

The parties behind the *West 514* litigation also protracted it by refusing to settle for anything other than protection of Magnuson's shopping center interests. This is reflected in the nature of the few settlement efforts which took place. Certain negotiations (which had absolutely nothing to do with the environment) were conducted between Cafaro and Harry Magnuson. Magnuson was negotiating either to become a part owner of any completed Liberty Lake mall, or to involve Cafaro in Magnuson's projects, or both. In exchange for a "piece of the action" for Magnuson, the *West 514* lawsuit would be dropped. Compton and Lyden, who were *parties* to *West 514*, were not informed by their counsel that these talks were taking place.[9] Nor were two genuine settlement overtures, which had been made by counsel for LLII and Cafaro, ever communicated to Compton or Lyden.

Preventing the development of proposed shopping centers through the use of environmental litigation brought in the name of straw parties was nothing new to the University City interests:

(1) Beginning in 1978, University City blocked one Spokane valley mall project (proposed by James S. Black & Co.) by paying legal and expert witness fees, thereby converting neighborhood concern about minor issues into a three-year-long lawsuit entitled *Riegel v. County of Spokane*, 31 Wn. App. 1038 (1982) ("*Riegel*") (filed February 9, 1979). A law clerk's memo to William Goss,

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[9]Lyden, in fact, met with his attorney, Randy Gaylord, exactly one time — to get the suit started — during the entire pendency of the lawsuit.

the attorney for the *Riegel* plaintiffs, shows that delay and stifling of competition were the point of the *Riegel* suit.

> Can we make some sort of argument that the issues to be decided in . . . [another case pending in Spokane County] will have an effect on the resolution of our [*Riegel*] case, and that therefore our case should be continued until the court reaches a decision? *If this is plausible, it would create further delay in our action.*

(Emphasis added.)

(2) In 1980, when University City had stirred up opposition to block another mall project proposed by R. A. Hanson, Hanson filed a retaliatory lawsuit (attacking a proposed University City expansion project). This litigation was settled in 1981 by mutual agreement containing promises not to obstruct one another's projects through misuse of governmental processes and litigation. This settlement agreement was breached by University City, which — beginning in 1985 — secretly stirred up further opposition against Hanson's efforts and funded the two-year-long lawsuit entitled *Crossman v. County of Spokane*, No. 86-2-01407-6 (filed April 24, 1986) ("*Crossman*").

In the 1981 settlement agreement between University City and Hanson, following University City's early efforts to block Hanson's project, Harry Magnuson (who signed the confidential settlement agreement) admitted that:

> University City, Inc. is opposing the development of Sullivan Mall and has proposed to continue to oppose said Sullivan Mall through various administrative and judicial processes.

The agreement also recognized that:

> Continued opposition by these parties to the respective University City and Sullivan Mall projects substantially diminishes the likelihood that either project will be successfully completed except at a very great cost to the prospective parties.

As part of the agreement, University City promised to stop opposing Hanson's project. Nevertheless, the *Crossman* suit was maintained in violation of the Magnuson-Hanson settlement agreement.

Evidence that the purpose of the protracted *Crossman* litigation was not to voice environmental concerns but rather to kill the Hanson project is seen in a letter from Tom May (the attorney paid by University City to represent the *Crossman* plaintiffs) to Everett Coulter (a conduit for the payment by University City of May's fees):

> [Plaintiffs'] interests, at least in part, reflect the interests of your client [University City]. These interests are best described in a single phrase: "*To completely stop the project and to preserve the area for all time.*" . . .
>
> Thus there is a potential for maintaining the cloud of litigation for a very long period of time. A decision whether to do so remains with the client, and we certainly solicit your client's input in that regard. . . .
>
> Record review cases, such as Sullivan Park, sorely challenge the abilities of plaintiffs' attorneys. Does your client consider a

> delay of two to four years a victory? If so, I am confident of a victory. . . . Even a loss on the merits, having occupied two or more years, may be a victory.

The merits of the *Crossman* litigation were entirely beside the point to University City. The suit was brought to stifle competition. Victory through delay — "maintaining the cloud of litigation for a very long period of time" — not victory on the merits, was the object of the *Crossman* suit.

(3) In 1980-81, Magnuson and Barnes planned to mount opposition to block commercial development by R.A. Hanson of a 22-acre parcel of land in Coeur d'Alene (efforts which were abandoned when Hanson did not develop the site). In 1980, R. A. Hanson acquired the 22 acres in Coeur d'Alene, Idaho, with a view towards developing a shopping center there. Magnuson told Barnes to look into stopping that project through sham opposition:

> This also brings to mind as to what we should be doing in Coeur d'Alene to monitor the local city situation, the legal situation, and the environmental situation with regard to Hanson's proposed development. We should do something here similar to what we are doing in the Spokane Valley.

What Magnuson was then "doing in the Spokane Valley" was funding the *Riegel* suit, and fostering opposition to the Hanson Spokane valley project.

(4) In the mid-1980s, to protect University City's proposed Coeur d'Alene mall, Magnuson delayed development of the Silver Lake Mall in Coeur d'Alene, by making misrepresentations to federal agencies responsible for funding

the EDA grants which were a necessary prerequisite for construction of utilities to serve the mall site.

B. Prior Proceedings.

This antitrust case was filed on December 29, 1989. On June 29, 1990, the district court denied respondents' motion to dismiss the complaint on several grounds, including *Noerr-Pennington*.

Respondents served and filed motions for summary judgment on June 12, 1991, raising, among others, issues of *Noerr-Pennington* immunity. The summary judgment motions were briefed and set for argument on December 20, 1991, over LLII's objection that respondents had not complied with outstanding discovery orders, document discovery was not complete and key depositions — including Harry Magnuson's — had not been taken. On March 10, 1992, the district court entered summary judgment of dismissal.

LLII timely appealed. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's summary judgment of dismissal on December 16, 1993. LLII timely petitioned for rehearing on December 29, 1993; and its petition was denied on March 4, 1994.

REASONS FOR GRANTING THE WRIT

Noerr-Pennington does not immunize sham lawsuits which seek only to make use of litigation's destructive side effects and are "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. . . ." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991), quoting *Noerr*, 365 U.S. at 144. The sham

exception "encompasses situations in which persons use the government *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon." 499 U.S. at 380.[10]

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[10]Leading commentators and jurists have recognized that sham litigation is a powerful anticompetitive weapon. Judge Bork has observed that:

> The predator need not expect to defeat entry all together. He may hope only to delay it. Sham litigation then becomes a useful tactic . . . for it may be worth the price of litigation to purchase a delay of a year or several years in a rival's entry into a lucrative market. . . .

Robert Bork, *The Antitrust Paradox* at 348 (1978).

In *Premier Elec. Const. Co. v. N.E.C.A., Inc.*, 814 F.2d 358 (7th Cir. 1987), Judge Easterbrook described sham petitioning:

> If the injury is caused by persuading the government, then the antitrust laws do not apply to . . . the persuasion (*Noerr-Pennington*). *If the injury flows directly from the "petitioning" — if the injury occurs no matter how the government responds to the request for aid — then we have an antitrust case. When private parties help themselves to a reduction in competition, the antitrust laws apply.*

Id. at 376 (emphasis added).

In *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), Judge Posner did the same.

> [I]f the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense, . . . it becomes a matter of antitrust concern. This is not to say that litigation is actionable under the antitrust laws merely because the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful

This petition raises two unresolved questions about sham litigation law which should be settled by this Court. Both questions arise from the opinion in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920 (1993).

The first question — whether misrepresentations and ethical abuses deprive litigation of *Noerr-Pennington* immunity — was expressly left open by this Court in *Columbia Pictures*:

> We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.

113 S. Ct. 1920, 1929 n.6.

> means, including litigation against competitors. *The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself — regardless of outcome — of litigating.*

Id. at 472 (emphasis added).

The District court below, during the course of this very case, commented that *environmental* litigation used by a skillful lawyer, can frustrate almost anything.

> I've said for years that a skillful lawyer, trained in environmental law could frustrate almost anything.

CR 468 at 85.

The second question arises from this Court's observation in *Columbia Pictures* that the antitrust court "may decide probable cause as a matter of law" when "there is no dispute over the predicate facts of the underlying legal proceeding." 113 S. Ct. 1920, 1930. The second question asks whether it is appropriate to apply that rule to this factually complex record.

Abuses and Misrepresentations.

It has long been thought that misrepresentations and abuses, although tolerated in the political arena, are improper in judicial or quasi-judicial proceedings and do not enjoy First Amendment protection. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d 948, 955, *reh. denied*, 801 F.2d 404 (11th Cir. 1986); *Clipper Exxpress v. Rocky Mt. Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260-1263 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *TRW Financial Systems, Inc. v. Unisys Corp.*, 835 F. Supp. 994, 1013 (E.D. Mich. 1993). Federal antitrust practitioners need to know whether this aspect of the sham exception to *Noerr-Pennington* remains good law.

This case presents a factual context in which this issue may be resolved. *West 514* involved serious misrepresentations and ethical abuses in the judicial process.[11] The

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[11]Earlier decisions, including other shopping center cases, have found abuses like those present here unworthy of First Amendment protection.

> The most serious allegations by the plaintiffs involve evidence that defendants engaged in a concerted program to solicit "straw parties" to act as plaintiffs in actions where defendants had no standing. They offered total financing and hold-harmless agreements as inducements and completely financed and controlled the

West 514 proceeding was itself a misrepresentation perpetrated by University, Magnuson and Barnes: (1) It was not in fact an environmental suit; its actual concerns fell outside the reach of the SEPA statute and regulations it purported to invoke. *West 514* was about economic competition. Its alleged environmental concerns were unsupported by credible evidence, and it was conceived, initiated, and funded in secret (Compton was told the case was being handled *pro bono*), solely to protect the University City interests from new shopping center competition. (2) It was prosecuted in the name of an unwilling litigant. Compton repeatedly informed her counsel that she wished to withdraw from the *West 514* litigation, and did so before the standing question was briefed and decided. Her requests were ignored, and

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> litigation. They directed the litigation in secret, refusing to reveal their role even under court order. They expressly misrepresented to state courts who the real parties in interest were. They named as plaintiffs people who, not only had no interest in the litigation, but who did not want to participate. At least one couple specifically told defendants they did not want their names used, but later read in a newspaper that they had been named as plaintiffs. This couple contacted the defendants to demand that their names be removed, but defendants continued to use the names, even throughout the appeal.

Ross v. Bremer, 1982-2 Trade Cas. at 71618. *Transkentucky Transportation R.R. v. Louisville R.R. Co.*, 581 F. Supp. 759, 770 (E.D. Ky. 1983) ("the commission of fraud and the knowing submission of false information do not enjoy immunity under the *Noerr* doctrine" where those actions "subverted the integrity of the governmental process"); *Israel v. Baxter Laboratories, Inc.*, 465 F.2d 272, 278 (D.C. Cir. 1972) ("the basic concern of the courts . . . may be deemed the integrity of the regulatory process. No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption").

Orville Barnes falsely told her that her name, once on, could not be taken off the suit.

Consistent with earlier precedent, the Ninth Circuit opinion in *Columbia Pictures* acknowledged that different considerations would be relevant, and that even successful litigation (*West 514* was not) could be sham, where misrepresentation and abuse of the adjudicatory processes are present. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 944 F.2d, 1525, 1531 n.7 (9th Cir. 1991), *aff'd*, 113 S. Ct. 1920 (1993). Such is the case here. The *West 514* lawsuit involved serious misrepresentations to the Spokane County Superior Court. The straw plaintiffs in the *West 514* litigation (Larry Lyden and Darlene Compton) were not the real parties behind the suit, and were before the court only to paper over standing problems and hide the involvement of the University City interests. The *West 514* litigation, which purported to concern substantial environmental issues addressed by SEPA, in fact did not. And the *West 514* litigation was maintained for years in Darlene Compton's name, despite her express direction to the contrary.

To summarize: The *West 514* suit involved the following abuses: (1) *West 514* plaintiffs Darlene Compton and Larry Lyden were solicited by Orville Barnes to oppose the Liberty Lake shopping center; (2) to persuade them to sue, Barnes misrepresented to Compton and Lyden that disaster would strike their own downtown properties if they did not sue; (3) Lyden and Compton did not pay anything for their participation in the lawsuit; (4) Compton's name was used in the lawsuit against her will, and her efforts to remove her name from the lawsuit were thwarted in an unethical fashion by her counsel; (5) Compton's efforts to remove her name from the lawsuit were wrongly rejected by Barnes, who misrepresented to her the fact that she could not have her

name removed; (6) at least two overtures to settle the *West 514* case were made by LLII's and Cafaro's counsel and those settlement overtures were not communicated by counsel to Compton or Lyden; (7) the one settlement discussion which did occur did not involve Compton, Lyden or Gaylord and turned only on Harry Magnuson's hope for a "piece of the action" at Liberty Lake; (8) counsel, in violation of the ethical rules, permitted the parties funding the litigation to actually control it; and (9) counsel undertook dual representation of the sham plaintiffs and Harry Magnuson, Orville Barnes and University City when there were patent conflicts of interest in doing so.

This Court should grant LLII's petition, take the opportunity presented here to address the question left open in *Columbia Pictures*, and hold that the misrepresentations and other abuses associated with the *West 514* suit strip the respondents of any *Noerr-Pennington* protection.

Baselessness.

The Supreme Court should also grant this petition because this case presents an opportunity to decide whether an antitrust court can or should decide *Noerr-Pennington* immunity as a matter of law on the facts of record here. The facts of this case are far more complex and revealing of anti-competitive motive and conduct than those raised by the antitrust counterclaims in *Columbia Pictures*. The rule in *Columbia Pictures* does not do justice to the actions of Harry Magnuson which halted the Liberty Lake mall development. This case deserves a careful look through the lens of this Court's extensive sham exception precedent predating and including *Columbia Pictures*. As Justice Stevens noted, about the new absolute rule announced in *Columbia Pictures*:

> Even in this Court, more complicated cases, in which, for example, the alleged competitive injury has involved something more than the threat of an adverse outcome in a single lawsuit, have produced less definite rules. . . . In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive. Moreover, a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market . . . without any interest in the outcome of the lawsuit itself. . . . It is in more complex cases that courts have required a more sophisticated analysis--one going beyond a mere evaluation of the merits of a single claim.

113 S. Ct. at 1934-35.

The district court's finding — utilizing *Columbia Pictures* — that *West 514* was automatically protected conduct because brought with probable cause overlooked two important points: *(1) The key figures in this case had no standing to pursue the underlying state litigation and did not, in fact, appear as "petitioning" parties. (2) The state trial court found the underlying suit factually insupportable and beyond the scope of the SEPA statute invoked.*

First, the University City interests had no standing to bring the *West 514* suit.[12] Indeed, Magnuson, Barnes,

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[12] *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973); *Eastlake Com. Co. v. Roanoke Assoc., Inc.*, 82 Wn.2d 475, 488 n.5, 513 P.2d 36 (1973); *Concerned Olympia Residents v. City of Olympia*, 33 Wn. App. 677, 682, 684, 657 P.2d 790 (1983). *Accord, Utility Reform Project v.*

University City and McCarthy were not parties to the *West 514* suit. *Noerr-Pennington* protection does not extend to persons who, without the right to petition the courts themselves, seek to injure competition by soliciting and funding the lawsuits of others. Phillip Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 203.1f at 33 (1993 Supp.). "A suit by one lacking standing is 'without merit' in the same way as a suit that has no basis in the substantive law." *Id.* *Accord*, *In re Burlington Northern Inc.*, 822 F.2d 518, 530-32 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988).

If the University City interests, especially Harry Magnuson, had commenced the *West 514* litigation as a named party, this suit would have readily been perceived as baseless for want of standing. This fact denies them *Noerr-Pennington* protection.

> If the litigant knows or reasonably should have known that it lacked standing, its litigation loses *Noerr*'s protection, even though its co-plaintiffs' claims subsequently prove meritorious.

Antitrust Law ¶ 203.1f at 33. *Accord*, *Landmarks Holding*, 664 F.2d at 896 (opponents who appealed zoning decisions knowing they had no standing not protected by *Noerr-Pennington*); *In re Burlington*, 822 F.2d at 532:

B.P.A., 869 F.2d 437, 447 (9th Cir. 1989); *Coughlin v. Seattle School Dist.*, 27 Wn. App. 888, 894, 621 P.2d 183 (1980). *See also Warth v. Seldin*, 422 U.S. 490, 499 (1975). The University City interests knew they lacked standing when the *West 514* case was filed. Harry Magnuson was a long-time Idaho resident; the Liberty Lake site is in Washington. Further, the University City interests knew they didn't have such standing because they had researched and briefed the issue themselves in 1980 in connection with the Hanson litigation to which University City and Magnuson were parties.

> [T]he interests supporting application of the antitrust laws to prohibit and penalize anti-competitive conduct are sufficiently strong to dispel any constitutional difficulties in withholding *Noerr-Pennington* protection from persons who, without the right to petition the courts directly, seek to further their anticompetitive goals through funding, encouraging, and assisting the lawsuits of others.

Id.

Second, the state trial court expressly held *West 514* was baseless because it was unsupported by credible evidence (evidentiary materials insufficient to allow any reasonable trier of fact to conclude concerns were more than speculation or conjecture) and not well-founded under Washington environmental law (real issue just what rules exclude from environmental consideration: economic competition). In its decision in *Columbia Pictures*, this Court stated a case was not baseless if a reasonable litigant could reasonably expect success on the merits. The parties behind the *West 514* suit fail this test. No one could reasonably expect success on the merits of a lawsuit they had no standing to bring, whose subject matter is not within the coverage of the statute invoked, and whose factual predicate is unsupported by evidence.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari be granted.

DATED: June 2, 1994.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-35300

OPINION

LIBERTY LAKE INVESTMENTS, INC.

Appellant,

v.

HARRY F. MAGNUSON, et al.

Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Robert J. McNichols, Chief Judge

Argued and Submitted
November 2, 1993 - Seattle, Washington

Filed December 16, 1993

Before: Tang, Farris & Rymer,
United States Circuit Judges

SUMMARY

Developer of property brought action against owners of competing businesses claiming violation of antitrust laws. The United States District Court for the Eastern District of Washington, Robert J. McNichols, Chief Judge, granted summary judgment for competitors, and developer appealed. The Court of Appeals, Rymer, Circuit Judge, held that evidence did not establish that prior environmental litigation undertaken by competitors was sham litigation so as to deprive them of immunity from liability under the antitrust laws on the basis of that litigation.

Affirmed.

COUNSEL

Earle J. Hereford, Jr., Culp, Guterson & Grader, Seattle, WA, for plaintiff-appellant.

Leslie R. Weatherhead, Witherspoon, Kelley, Davenport & Toole, Spokane, WA, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Washington.

Before: TANG, FARRIS, and RYMER, Circuit Judges.

OPINION

RYMER, Circuit Judge:

Liberty Lake Investments, Inc. owned property on Interstate 90 between Spokane, Washington and Coeur d'Alene, Idaho, which it wished to sell to a developer for construction of a regional shopping center. It encountered various difficulties, such as signing up sufficient tenants satisfactory to the prospective anchor tenant, the Bon Marche (the Bon); negotiating a deal with the Washington Department of Transportation for improved access to the shopping center; and fighting a challenge by Spokane shopping center interests to permits for Liberty Lake.

This antitrust action primarily has to do with a last-minute appeal to the Spokane Board of County Commissioners (Board), claiming that the County Hearing Examiner Committee erred in granting Liberty Lake a permit without a new Environmental Impact Statement (EIS), and litigation in the Washington state courts alleging that the Liberty Lake zoning plan violated Washington's Environmental Policy Act (jointly, *West 514* litigation). Both proceedings were brought by West 514, Inc., which operates a tavern in downtown Spokane, and other individuals who do business in Spokane, but they were prompted and paid for by Harry F. Magnuson, the major shareholder of University City, Inc., which owns a number of shopping centers, University City, and McCarthy Management and Development Company, which manages University City's Spokane shopping center (collectively, Magnuson).

The complaint alleges that these parties conspired to mount a frivolous environmental challenge to Liberty Lake's plan to develop its tract of land for sale as a

regional shopping center. On the grounds that Liberty Lake lacked antitrust standing, and that the *West 514* litigation was not sham and defendants' conduct was therefore immune from antitrust liability under the *Noerr-Pennington* doctrine, the district court granted summary judgment in favor of defendants. Liberty Lake appeals both rulings, and also argues that the district court erred in deciding the summary judgment motion while it was conducting discovery essential to opposing that motion. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

We review de novo the district court's grant of summary judgment. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990); *State Farm Fire & Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989); *Judie v. Hamilton*, 872 F.2d 919, 920 (9th Cir. 1989).

II

Liberty Lake first argues that the district court incorrectly held that it lacks antitrust standing to pursue this action. We do not resolve this issue because even if Liberty Lake does have antitrust standing, it cannot meet the test set out in *Professional Real Estate Investors, Inc. v, Columbia Pictures Industries, Inc.*, ___ U.S. ___, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993), for the sham

exception to the *Noerr-Pennington* doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S. Ct. 523, 533, 5 L. Ed. 2d 464 (1961) (there may be situations where campaign ostensibly directed toward influencing governmental action is a mere sham to cover attempt to interfere directly with the business relationships of a competitor).

A

Relying on our opinion in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525 (9th Cir. 1991), the district court held that in order to support a finding of sham, an antitrust plaintiff must show that a lawsuit is baseless and that the suit was brought as part of an anticompetitive plan external to the underlying litigation. *Id.* at 1532. Applying this test, the district court held, as a matter of law, that the *West 514* litigation was not baseless.

Since the district court's decision in this case, the Supreme Court has affirmed our decision in *Columbia Pictures* and adopted a similar, two-part test for the sham litigation exception to *Noerr-Pennington:*

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr,* and an antitrust claim premised on the sham exception must fail. Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.

> Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor, through the use of the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon.

Professional Real Estate Investors, ___ U.S. at ___, 113 S. Ct. at 1928 (footnote, citations, and quotation marks omitted).

[1] Liberty Lake argues that the *West 514* litigation was objectively baseless for several reasons. First, it says that the *West 514* plaintiffs lacked standing because the injury at stake was to competitive economic interests, not to the environment. We cannot agree, however, that the *West 514* plaintiffs lacked an objectively reasonable basis for believing they had standing; indeed, the Washington superior court *held* they had standing under the State Environmental Protection Act (SEPA) when it issued a writ of review. That the Washington courts later found that the *West 514* plaintiffs failed to establish an injury to Spokane's water supply goes to the merits, not to whether they were threatened with an injury in fact on account of water contamination, or to whether they came within the zone of interests protected by SEPA.

[2] Next, Liberty Lake contends that the *West 514* suit was baseless because the plaintiffs lost at every stage of the proceeding. The Supreme Court has instructed, however, that "when the antitrust defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must

have been unreasonable or without foundation." *Id.* at ___ n. 5, 113 S. Ct. at 1928 N. 5 (quotation marks omitted).

The Washington appellate court resolved the *West 514* plaintiffs' appeal adversely on the ground that SEPA plaintiffs must show "probable," as opposed to merely "possible," environmental harm before an EIS is required. *West 514, Inc. v. County of Spokane,* 53 Wash. App. 838, 770 P.2d 1065, 1070 *review denied,* 113 Wash. 2d 1005, 777 P.2d 1050 (1989). It then affirmed the superior court's decision on the merits, holding that the proposed shopping center's threat to economic competition in downtown Spokane did not cross the "probable" threshold. The parties disagree about whether *West 514* established a new standard for recovery under SEPA, but on any view the difference between "possible" harm and "probable" harm is a matter of degree which cannot render the lawsuit objectively baseless.

[3] Liberty Lake also suggests that the superior court must have determined that the *West 514* litigation was wholly without merit because it said that the plaintiffs' scientific evidence regarding potential harm to the Spokane aquifer "fall[s] far short of scientific probability or likelihood. When viewed in the context of the entire record, in light of the public policy enunciated in SEPA, those [expert] opinions are not persuasive." We do not read this statement as Liberty Lake would like. It is not a holding that the *West 514* plaintiffs' case had no chance of a favorable outcome, but rather it is a finding which reflects the weight accorded to their evidence.

Neither the Washington courts nor the Board intimated that the *West 514* suit was frivolous or objectively baseless. While not ultimately successful or of overwhelming strength, the suit was not so objectively

baseless that no reasonable litigant could realistically expect success on the merits. Accordingly, Liberty Lake does not get over the "objectively meritless" hurdle, and we may not, therefore, examine defendants' subjective motivation. *Professional Real Estate Investors,* ___ U.S. at ___, 113 S. Ct. at 1928.

B

Assuming that we disagree that the first prong of the *Professional Real Estate Investors* test is met, Liberty Lake nevertheless argues that the sham exception saves its action because of Magnuson's unethical conduct of the *West 514* litigation. If there is abuse in the litigation process, Liberty Lake contends, then under footnote 6 of the *Professional Real Estate Investors* opinion it is unnecessary even to reach its two-part test.

In footnote 6, the Court declined to decide "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at ___, 113 S. Ct. at 1929 n. 6. Liberty Lake points to evidence that Magnuson solicited straw parties to prosecute the *West 514* environmental challenge, that one of the plaintiffs did not wish to be a party to that litigation, that Magnuson paid the plaintiffs' legal fees, and that counsel failed to communicate settlement overtures to some of the plaintiffs. It urges that these tactics amount to fraud and misrepresentation and suffice to make the litigation sham without regard to the objective merit of the lawsuit or its proponents' motivation.

As we read the Court's footnote 6, however, it does no more than reserve the issue of whether antitrust liability may be premised on a litigant's deceptive conduct which

goes to the core of a lawsuit's legitimacy, such that it is not "genuine," either in the sense of "'having the reputed or apparent qualities or character'" (i.e., objectively "genuine") or being "'sincerely and honestly felt or experienced'" (i.e., subjectively "genuine"). *Id.* at ___, 113 S. Ct. at 1929 (quoting Webster's Third New International Dictionary 948 (1986)).[1]

Following its reservation of the question whether "fraud or other misrepresentations" may amount to "sham," the Court cited as analogous authority *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965), which held that a patent procured by intentional fraud on the Patent Office could form the basis for a federal antitrust claim, *id.* at 176-77, 86 S. Ct. at 349-50; Justice Harlan's *Walker Process* concurrence, which emphasized that the Court's holding reached only "deliberate fraud," *id.* at 179-80, 86 S. Ct. at 351-52 (Harlan, J., concurring); and Rule 60(b)(3), which allows a party to obtain relief from judgment because of its opponent's "fraud . . . misrepresentation, or other misconduct."

[4] In a case involving a fraudulently-obtained patent, that which immunizes the predatory behavior from antitrust liability (the patent) is, in effect, a nullity because of the underlying fraud. Similarly, Rule 60(b)(3) enables a party to set aside an otherwise valid judgment on the ground that it resulted from an opposing party's fraudulent behavior or misrepresentation to the court. *See* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and*

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[1]Footnote 6 was appended to the Court's admonition that "[t]o be sham, . . . litigation must fail to be 'genuine' in *both* senses of the word." U.S. at ___, 113 S. Ct. at 1929 (emphasis added).

Procedure: Civil § 2860, at 188-89 (1973). Read in context with the entire *Professional Real Estate Investors* opinion, footnote 6 does not obviate application of the Court's two-part test for determining sham litigation in the absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.

[5] No such scenario is presented in this case. Liberty Lake relies mainly on the declaration of Darlene Compton, one of the *West 514* plaintiffs, to establish that Magnuson and the lawyers he employed misrepresented to several of those plaintiffs the nature of the litigation. In her declaration, however, Compton states that she willingly agreed to become a named plaintiff in the case because of her sincere interest in the lawsuit's stated claim for relief, namely, an updated EIS for the proposed Liberty Lake development. Compton also states that, at the time of the original appeal to the Board, she wasn't particularly concerned about who was providing financial support for the litigation. Compton did not express a desire to withdraw from the lawsuit until the superior court issued its final ruling. That ruling was filed on March 7, 1988, nearly 13 months after the filing of the appeal to the Board and the subsequent breakdown of Liberty Lake's attempt to sell the land to a willing purchaser, ten months after the Bon withdrew its letter of intent to be an anchor tenant at the Liberty Lake mall, and eight months after Liberty Lake notified its potential buyer that it would begin to seek other developers for the property. Even without Compton's willing participation, it isn't possible to characterize the *West 514* litigation as lacking legitimacy. Nothing in the record indicates the remaining *West 514* plaintiffs were unwilling participants in the litigation. For similar reasons, the failure of the *West 514* attorneys to inform

Compton of the opposing side's settlement overtures does not render the litigation illegitimate.

Liberty Lake's evidence at most goes to Magnuson's motivation, which we are precluded from examining. *Professional Real Estate Investors,* ___ U.S. at ___, 113 S. Ct. at 1928. The Court's opinion makes it clear that unless a lawsuit is objectively baseless, whether an antitrust defendant "was indifferent to the outcome on the merits" of the suit, or "had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process" is immaterial. *Id.* at ___, 113 S. Ct. at 1931 (citing as *"contra" Grip-Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied,* 461 U.S. 958, 103 S. Ct. 2430, 77 L. Ed. 2d 1317 (1983), in which Judge Posner suggested that "[t]he line is crossed when [the antitrust defendant's] purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself — regardless of outcome — of litigating"); *cf. id.* ___ U.S. at ___-___, 113 S. Ct. at 1935-36 (Stevens, J., concurring in the judgment but disagreeing with the majority that prosecuting a lawsuit in which the plaintiff is indifferent to the outcome but has sought to impose a collateral harm on the defendant by such things as abusing the discovery process is not sham). As the conduct upon which Liberty Lake relies boils down to indifference to outcome and intent to inflict injury through collateral consequences, it is irrelevant and summary judgment was properly entered.

III

We review for abuse of discretion the district court's denial of a Rule 56(f) motion for additional discovery prior to summary judgment. *Garrett v. City &*

County of San Francisco, 818 F.2d 1515, 1518 (9th Cir. 1987).

Liberty Lake's Rule 56(f) arguments are directed toward the district court's summary judgment ruling on antitrust standing grounds. Because we affirm on *Noerr-Pennington* immunity grounds, we need not decide whether the district court abused its discretion in deciding the standing issue without allowing additional discovery.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. C-89-00823-RJM

ORDER GRANTING SUMMARY JUDGMENT

LIBERTY LAKE INVESTMENTS, INC.

Plaintiff,

v.

HARRY F. MAGNUSON, et al.

Defendants.

Argued and Submitted
December 20, 1991

Filed March 10, 1992

Before: Robert J. McNichols, United States District Judge

BEFORE THE COURT are the Defendants' Motions for Summary Judgment. (CR 287, 288, 305). A hearing with oral argument was held on these matters on December 20, 1991, at 8:30 a.m.. Having considered the arguments of counsel, reviewed the record, and being fully advised in this matter, IT IS HEREBY ORDERED that the Defendants' Motions for Summary judgment are **GRANTED.**

STATEMENT OF THE CASE

A summary of the undisputed or inadequately contested facts drawn primarily from contemporaneous correspondence, memoranda, and other documentation is as follows.

A: GENERAL BACKGROUND

In July, 1976, the Wells B. McCurdy Trust (Trust) was formed with Wells B. McCurdy as trustee. The sole stated purpose of the Trust was to hold the interest and title in property intended for the development of a regional shopping center located approximately fifteen miles east of Spokane, Washington. The property is roughly equidistant between Spokane and Coeur d'Alene, Idaho, and a mall there would hopefully draw business from both the Spokane and Northern Idaho markets. The trustee was empowered to carry on ordinary business activities, and the Trust began laying the groundwork for development, including securing appropriate zoning for the property.

The Trust actively sought purchasers for the property, wanting a buyer who would construct the desired regional shopping mall. The Trust negotiated with several possible buyers with varying degrees of success.

Shopping malls require large anchor tenants to be successful. Both the Trust and certain possible buyers contacted potential anchor tenants, the Bon and Sears showing the strongest interest. However, in November, 1983, Sears notified the trust they did not believe the area market would support a second Sears store until approximately 1990.

In March, 1984, the Bon committed to the mall site as an anchor tenant, contingent on two other department store tenants acceptable to the Bon being secured. The commitment was based on the March 20 proposal submitted by Graham Development Services, Inc., the promising buyer at the time. The proposal provided a short list of proposed co-anchor tenants; Penneys, Sears, Lamonts, Nordstrom, and the Crescent.

In April, 1984, the Trust met with Nordstrom representatives concerning possible mall tenancy, but Nordstrom was not interested. Shortly thereafter, Sears contacted Graham Development, notifying them a Sears store was not foreseen at the mall site in the immediate future, and characterizing Sears' position as not interested. In July, the Trust attempted modifying the agreement with the Bon to require only one other anchor tenant. The Bon rejected the proposed amendment, insisting on two acceptable co-tenants. The Bon's position on the number and acceptability of co-tenants would continue unchanged.

In September, 1985, the Trust reached a sale agreement with a Utah developer. The developer, Winget, Vichrilli & Ford (WVF), sent a proposal to the Bon agreeing with Bon's requirement of two other acceptable stores as anchor tenants, and listed possible candidates as Penneys, Mervyns, Shopko, Sears, Lamonts, Nordstrom, and the Crescent. The Bon president at the time, William

Fix, has since stated Mervyns and Shopko were considered low-end stores, and could not have operated together as the other required anchor tenants.

WVF was unable to secure commitments from two qualifying tenants, and in June, 1986, Bon began pressuring the Trust to move mall development along. A June 10 letter reminded the Trust the Bon's decision to build included the stipulation of an August 1987 opening with two other anchor stores. The Bon felt it was obvious an opening on the agreed date was impossible due to WVF's lack of performance, and suggested the Trust regain control of the property and find a more successful developer.[1]

On June 17, 1986, the relationship between the Trust and WVF was terminated because WVF had not secured the requisite anchor tenants. Within a week, the Cafaro Company (Cafaro) approached the Trust expressing interest in developing the mall.

In August, 1986, Cafaro met with the Washington State Department of Transportation (DOT) regarding

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1

> "The Board of directors of Allied Stores Corporation approved the building of a store at Liberty Lake with the stipulation that we open in August 1987 with two other majors.
>
> It is obvious to me that we will not open in August 1987 due to lack of performance on the part of your developer.
>
> I suggest you get control of the property and find a new developer who is more responsive to both our needs."

Defendants' Ex. 40. (letter from Fix to McCurdy).

access to and traffic around the mall site. Cafaro was informed by the DOT that expensive improvements would be necessitated by the construction of the mall, and the developer would be expected to provide a substantial share of the costs.[2] DOT's policy regarding substantial sharing of the total costs would remain unchanged.[3]

In October, Cafaro essentially reiterated WVF's proposal to the Bon, adding Target and Emporium as

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[2]An August 22, 1986 DOT memo to file described a DOT meeting with representatives of Cafaro. The meeting concerned the improvements needed for the Greenacres and Harvard Road Interchanges on Interstate 90 if a mall at Liberty Lake was built.

The DOT representative wrote:

> "I explained that both interchanges function adequately now, and without the mall development, the only thing we need to do is to replace the Harvard Bridge Rail and improve vertical clearance. In other words, we do not plan to move ahead with these projects in the near future.
>
> Mr. Richley asked how they could change our attitude toward priority. I said that the best way was to contribute funds to the project. He asked if I meant the 10 percent state share. I said no, I meant a major share of both the state and federal funds, since federal dollar availability was the major problem."

Defendants' Ex. 44.

[3]The DOT eventually arrived at 41% as the appropriate share of total costs required from a developer. The estimates of the total costs necessary for the required improvements ranged from a low of $4,874,200 (Defendants' Ex. 74), to median amounts of $5.5 million (DOT Final Environmental Impact Statement, p. 80) and $7.6 million (Defendants' Ex. 73), to a high of $10 million (Defendants' Ex. 44). 41% of an average of these amounts leads to an expected investment from a developer of close to $3 million.

possible anchor tenants. The Bon accepted the proposal, again reserving the right to approve the other anchor tenants. Fix has since stated Target in combination with Mervyns or Shopko would not have been acceptable to the Bon.

Liberty Lake Investments, Inc., the plaintiff here, incorporated in December, 1986. Shortly after incorporating, the plaintiff purchased an outstanding loan from SeaFirst Bank secured by the Trust property to prevent foreclosure.

On December 16, 1986, Cafaro wrote to the Trust describing Sears as "the key to this project," and discussing setbacks in securing Sears as an anchor tenant. Particular attention was paid to a Sears market report indicating possible problems with a store at the mall, and showing more favorable conditions for a store in Coeur d'Alene, Idaho. The letter also stated any interest by Target and Mervyns was contingent on the tenancy of Sears, and that Nordstrom, Crescent, and Penneys were reluctant to pursue a project at Liberty Lake.[4]

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[4]J.J. Cafaro wrote McCurdy, stating the Cafaro Company, remained highly interested in the project, such interest being predicated upon Cafaro's ability to obtain two major department stores.

Cafaro continued:

> "As you have always understood, the second major department store and the key to this project is Sears."

Defendants' Ex. 53.

The letter discussed serious difficulties in securing Sears as an anchor tenant, among them the retirement of the Sears' Regional Retailing manager who had been enthusiastic about the mall. The letter also described the disappointing and negative results of Sears'

The letter concluded that until an agreement could be reached with Sears, it was impossible to move the project forward. Sears' lack of interest is recognized in Cafaro's proposal to Sears on December 26, 1986, which explicitly recognized Sears' preference for developing a project in Coeur d'Alene.[5]

Cafaro's development plan for the mall was approved by the Spokane County Hearing Examiner Committee on January 8, 1987, contingent on Cafaro reaching a negotiated agreement with the DOT for sharing costs of the improvements necessitated by the Mall.[6] In

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area marketing study. Cafaro concluded:

> "With all of the above referenced points in mind, it would be necessary to make an extremely attractive offer to Sears in order to sway them to locate . . . at Liberty Lake."

Id.

[5]The Cafaro Company sent a proposal to Sears on December 26, 1986, which opened:

> ". . . I realize that it is your preference to develop a project in Coeur d'Alene vs. the Liberty Lake area . . ."

Defendants' Ex. 55.

[6]The Committee Findings and Order provided:

> "D. CONDITIONS OR CONTINGENCIES APPLIED TO THIS APPROVAL
>
> 1. The Sponsor will negotiate an agreement for on and off-site highway improvements with the State Department of

February, the Board of County Commissioners approved the decision of the Hearing Examiner Committee, issuing a formal decision on March 10, 1987.

On April 9, 1987, a notice of appeal and application for writ of review of the Board decision was filed in Spokane County Superior Court by defendants West 514, Inc., Antone and Sundena Plese, and Darlene Compton. A writ was subsequently issued by Judge Donohue. The *West 514* litigation in large part serves as plaintiff's basis for this suit, and is discussed in more detail below. The *West 514* plaintiffs essentially claimed the Board inadequately considered the environmental impact of a large, regional mall on the underlying aquifer which provides fresh water to much of Spokane County.

On April 14, 1987, a development company announced plans to build the Silver Lake Mall in Coeur d'Alene. The primary anchor tenants were Penneys and Sears. Penneys felt the enclosed mall in Coeur d'Alene would eliminate the possibility of a Liberty Lake area mall, which they believed would be detrimental to the sales of Spokane Penneys stores.

During this time, Cafaro and the DOT discussed appropriate cost-sharing, but had not reached an agreement. Cafaro wished to provide only 41% of the 10% local share of the state costs for the improvements, while the DOT felt Cafaro was obligated to account for a

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> Transportation and Spokane County. This agreement will be based on a pro-rata share of the Liberty Lake Mall's traffic impacts . . ."

Defendants' Ex. 60.

fair share of the total costs.[7] In a memorandum dated May 13, 1987, Cafaro stated "if we have to pay 41% on total project, this deal is dead."[8] Cafaro never reached an agreement with the DOT on cost-sharing.

Also on May 13, the Bon ownership, Allied Stores Corporation, wrote Cafaro and canceled their Letter of Intent to open and operate a store at the mall. The short letter cited Cafaro's inability to deliver an operational store

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[7]The DOT representative, describing the meeting with the Cafaro Company in a DOT internal memorandum, stated:

> "I explained that we have a severe shortage of both State and Federal I-4R funds, and that to be considered, their offer must include their fair share of both State and Federal costs."

Defendants' Ex. 69 (emphasis in original).

[8]Defendants' Ex. 111. Two days later, on May 15, the DOT wrote Cafaro:

> "The Theory behind computation of Cafaro's share of the highway improvements is that Cafaro should pay for a share of total project costs in the same proportion that Mall traffic contributes to total traffic. As we discussed in our meeting, we expect Cafaro to fund their fair share of the total cost of both Greenacres and Harvard Rd. Interchange improvements, including both State and Federal funded portions of the project."

Defendants' Ex. 72 (emphasis in original).

by August, 1987, and Cafaro's failure to find the two additional anchor stores.[9]

On April 28, 1987, the plaintiff filed suit foreclosing on the Trust property. This suit was settled a month later, the plaintiff to sell the property and distribute the proceeds according to a set formula. The sale of the property was not considered imminent, and it was understood the sale could possibly not occur for several years.

In the summer of 1987, the Bon ownership began demanding more favorable arrangements for mall participation from Cafaro. Cafaro felt the Bon's position was unreasonable, and continued seeking alternate anchor tenants for the mall. Cafaro expected no firm arrangements with alternate tenants for several years, and

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[9]Fix wrote J.J. Cafaro:

> "You will recall that I gave you a Letter of Intent which was subject to performance. You guaranteed at that time that a Shopping Center would be opened by August of 1988, so that we could start operation at that time. You further stated that if we would allow you to go fast-track and construct our store, that you could open the center in August 1987 which was very interesting to me. You were further supposed to advise me long ago about your commitments regarding the two additional department stores.
>
> It is quite obvious that you have not performed accordingly and would be unable to deliver the store, or the two additional department stores, for August 1987. In view of this, I am hereby canceling my Letter of Intent."

Defendants' Ex. 71.

informed the plaintiff. The plaintiff remained committed to the mall project with Cafaro, but told them if the mall could not be timely completed, the plaintiff would seek other purchasers of the land, including the proposed mall site.

In August, 1987, Cafaro informed the plaintiff that absent a lawsuit compelling Allied Stores' performance, Cafaro did not see the Liberty Lake Mall being developed at that time. Cafaro representatives stated Cafaro would start the center the instant they had a workable arrangement with The Bon or its equivalent. However, they also indicated prospects of a deal with the Bon were not promising, and no alternatives to the Bon were in mind.[10] Within a week, the plaintiff notified Cafaro the property was being placed on the market.[11]

In February, 1988, Cafaro approached the plaintiff with a proposal for the mall involving the purchase of certain Crescent stores, but plaintiff expressed no interest, stating the plaintiff's owners were not shopping center

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[10]Defendants' Ex. 77.

[11]William Rademaker wrote J.J. Cafaro following a meeting with Cafaro Company representatives. Rademaker's understanding was:

> ". . . that absent a satisfactory arrangement with The Bon or equivalent, The Cafaro Company would not move forward with the project. We discussed at some length the status of negotiations with The Bon and concluded that the situation was far less than optimistic."

Defendants' Ex. 79.

developers.[12] On April 20, 1988, plaintiff approached another possible developer for the site, stating plaintiff was not interested in developing a shopping center, preferring to sell property to a developer who would undertake the mall project.

In May, Cafaro indicated that in the event sufficient commitments from anchor tenants for the mall were secured, Cafaro would commence the center despite the on-going *West 514* litigation.[13] Cafaro approached the

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[12]As described by Rademaker in a memo to file:

> I told him that the Liberty Lake Investments, Inc.'s ownership were investment/landholders who were interested in selling acreage and were not shopping center developers and operators.

Defendants' Ex. 80.

[13]In a May 11, 1988 memo to the Liberty Lake Investors, Rademaker described a meeting with J.J. Cafaro, stating Cafaro:

> ". . . indicated that in the event the Cafaro Company had sufficient commitments to commence the center and the current litigation was ongoing to the appeal process, the Cafaro Company would commence the center despite the litigation. He said that they did this in Puyallup in the face of what they viewed as much stronger opposition. The Cafaro Company would, in essence, indemnify the majors from any loss in the event the adverse court ruling required them to demolish the center."

Defendants' Ex. 82.

Following the December 20, 1991 oral argument, plaintiff presented additional exhibits supporting plaintiff's arguments that delays from the *West 514* litigation were responsible for the failure of the mall development project. These exhibits consist of a memo from

Bon again with a proposal in December, which Allied Stores rejected in a short letter written January 27, 1989.

B: THE *WEST 514* LITIGATION AND FACTS RELATING TO NOERR-PENNINGTON

Defendant Harry Magnuson is a wealthy investor with significant financial interests in Spokane area real estate and shopping malls. Magnuson was actively seeking to develop a mall in Coeur d'Alene during the time plaintiff and the Trust were attempting to secure anchor tenants for the Liberty Lake Mall.

In October, 1985, Magnuson met with the Bon and was told of the Bon's commitment to the Liberty Lake project. Magnuson argued the Liberty Lake project was unworkable, and told Fix he was going ahead with his Coeur d'Alene development, and he could stifle and prevent the people from going to Liberty Lake.

In a letter to defendant Orville Barnes describing the meeting with the Bon, Magnuson indicated he was planning to move forward so the Liberty Lake plan could be stifled. In another letter to Tom Rowe in February, Magnuson stated he would like to do anything possible to head off the Liberty Lake development because of possible harm to Coeur d'Alene and Northern Idaho. Other documents indicate Magnuson remained concerned about the Liberty Lake project and the threat it posed to his Spokane mall and his proposed Coeur d'Alene development.

Wells McCurdy, a letter from Cafaro's counsel to William Fix, and several newspaper articles. It should be noted that all the exhibits, with the exceptions of a July, 1989 newspaper article, were authored before the May, 1988 memo quoted above.

As mentioned above, Cafaro's development plan for the mall was approved by the Spokane County Hearing Examiner Committee on January 8, 1987. This decision was appealed to the Board of County Commissioners. In February, the Board affirmed the decision of the Hearing Examiner Committee, issuing a formal decision on March 10, 1987. These decisions approved the adoption of a Mitigated Determination of Non-Significance (MDNS) because of a prior Environmental Impact Statement (EIS) prepared for the site for a similar project which was not developed. The prior EIS was considered sufficient along with the MDNS, and a new or supplemental EIS was not required.

On April 9, 1987, a notice of appeal and application for writ of review of the Board decision was filed in Spokane County Superior Court by defendants West 514, Inc., Antone and Sundena Plese, and Darlene Compton. The *West 514* plaintiffs essentially claimed the Board in adopting the MDNS inadequately considered the environmental impact of a large, regional mall on the underlying aquifer which provides fresh water to much of Spokane County. The plaintiffs were also concerned about possible blight to downtown Spokane. The Superior Court found standing and issued a writ of review.

On April 19, 1988, Judge Michael Donohue entered a judgment upholding the county's approval of the plan. The court found that in Washington State, economic concerns were not environmental concerns. The court noted the majority of the material before the Board pertained to economic blight, and determined the evidence led the court "to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition." The court also

found the opinions of the plaintiffs' experts unpersuasive and lacking the requisite scientific probability.

The decision of the Superior Court was itself appealed. On April 13, 1989, the Washington State Court of Appeals published an opinion, *West 514, Inc. v. County of Spokane*, cited at 53 Wn. App. 838, upholding the trial court decision. The Washington State Supreme Court denied the plaintiffs' petition for review on June 28, 1989.

The *West 514* litigation moved slowly through the state courts. Transcripts from the Superior Court proceedings indicate the delays were caused by the busy schedules of everyone involved. At one point, acceleration of scheduling was being discussed. After Judge Donohue commented that the case was "proceeding at glacial speed," counsel for Cafaro responded that while Cafaro wanted the case to move along, "some deliberateness is

necessary if it's gonna get done right."[14] A Stipulated Order was eventually entered accelerating the schedule.

The appeal also proceeded slowly, the delays attributable to both parties. A memo from plaintiff's president dated August 7, 1987, states Cafaro had instructed their Spokane counsel to proceed slowly on the

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[14]A portion of the October 8, 1987 transcript contains the following exchange:

> "THE COURT: Why has it taken this long to get it back to me? Is it just a matter of scheduling?
> MR. GAYLORD: Just a matter of schedule, some continuances by parties –
> THE COURT: Some of my unavailability, too."

Defendants' Ex. 108. The Scheduling Order was subsequently discussed:

> "THE COURT: Can we shorten that? Is it possible?
> MR. SYMMES: Let's shorten it. I think we should shorten –
> THE COURT: It seems to me we are proceeding at glacial speed, and I would like to get a move on if we can.
> MR. EMACIO: (representing Spokane County) . . . I am not willing to shorten because I think, your Honor, the issues are so important here, the record has to be done right. And quite frankly, the issues need to be articulated in a very precise manner. I see no need for urgency in this regard . . .
> MR. SCHULTZ: Your Honor, perhaps my client has greatest interest in moving this along in a hurry. He is the developer of it. He does wish to move it along; however, I have been involved in these cases many times and I know some deliberateness is necessary if it's gonna get done right . . ."

Id.

appeal because of settlement negotiations involving defendant Magnuson.[15]

Evidence presented to this court indicates defendant Harry Magnuson paid the legal costs incurred in appealing Spokane County decisions and pursuing the *West 514* litigation. There is also evidence Magnuson, through defendant Orville Barnes, solicited certain *West 514* plaintiffs to bring the action.

LAW ON SUMMARY JUDGMENT

A summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

On a motion for summary judgment, this court must determine if a fair-minded jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The party seeking summary judgment must show no genuine issue of material fact exists and he is entitled to judgment as a matter of law by showing the court there is an absence of evidence to

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[15]Rademaker's August 1, 1987 memo to Liberty Lake Investors, Inc. stated Cafaro's representative had informed Rademaker:

> ". . . that he had instructed Mr. Schultz, Spokane counsel, to slow up on the appeals litigation because of [difficulty with securing anchor tenants] and because, in Mr. Daniluk's view, a settlement is in the offing."

Defendants' Ex. 77.

support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The party opposing the motion must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). That party must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex*, 477 U.S. at 324. The nonmoving party may do this by use of affidavits (including his own), depositions, answers to interrogatories, and admissions. *Id.* However, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587.

FEDERAL ANTITRUST CODE

This action is based on the following sections of Federal anti-trust code. Every contract or conspiracy in restraint of trade or commerce is declared to be illegal, and every person who shall make or engage in any such contract or conspiracy shall be deemed guilty of a felony. 15 U.S.C. § 1. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the appropriate United States district court without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee. 15 U.S.C. § 15(a).

DISCUSSION

Defendants seek summary judgment on three issues:
(1) plaintiff's standing to bring an antitrust action;
(2) whether a conspiracy existed causing an appropriate

injury; and (3) whether the *Noerr-Pennington* doctrine protects the defendants. The first and third issues present substantial questions of law and are addressed. The second issue predominantly concerns questions of fact but because of the disposition of the first and third issues need not be addressed.

A: STANDING

The issue of status as a proper party in an antitrust suit is a pure question of law. *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 539 (9th Cir. 1987).

The current elements of antitrust standing have their basis in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), and *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). In *McCready*, the Court found standing for the party who brought the underlying action although she was not a competitor of the conspirators because the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on the market. *McCready*, 457 U.S. at 484. *Associated General Contractors* went further, enumerating several factors to be considered by courts in determining standing. *Associated General Contractors*, 459 U.S. at 537-45.

The Ninth Circuit has analyzed *McCready* and *Associated General Contractors* to develop a clear list of factors for determining standing. Defendants cite *Star-Kist Foods, Inc.*, 812 F.2d at 540, which identifies the relevant factors as:

(1) The nature of the plaintiff's alleged injury-whether it was the type the antitrust laws were intended to forestall;

(2) The directness of the injury;
(3) The speculative measure of the harm;
(4) The risk of duplicative recovery; and
(5) The complexity in apportioning damages.

Defendants also cite *Sacramento Valley, Chapter of Nat. Electrical Contractors Asso. v. IBEW, Local 340*, 888 F.2d 604, 605 (9th Cir. 1989), which substitutes "keeping the scope of complex antitrust trials within judicially manageable limits" for the fourth and fifth factors in *Star-Kist Foods, Inc.*.

Plaintiffs cite more recent decisions enumerating slightly different factors. The plurality opinion in *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc), has become the leading decision on antitrust standing in the Ninth Circuit, and lists the relevant factors as:

1. The specific intent of the alleged conspirators;
2. The directness of the injury;
3. The character of the damages, including the risk of duplicative recovery, the complexity of apportionment, and their speculative character;
4. The existence of other, more appropriate plaintiffs;
5. The nature of the plaintiff's claimed injury.

No single factor is determinative, and the court must balance all the factors. *Id.*

The second and fifth factors are crucial in the present case. The second factor in the antitrust contest means close in the chain of causation. *R.C. Dick*

Geothermal Corp., 890 F.2d at 147. The fifth factor requires that the injured party be a participant in the same market as the alleged malefactors. *Id.* A plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury. *In re Insurance Antitrust Litigation*, 938 F.2d 919, 926 (9th Cir. 1991).

Regarding the second factor of antitrust standing, the directness of the injury, the evidence shows the plaintiff was unable to secure commitments from anchor tenants. The only firm commitment plaintiff had was from the Bon, and this agreement was contingent on (1) an August, 1987 opening, and (2) commitments from two other anchor stores acceptable to the Bon. The Bon ultimately terminated its Letter of Intent, citing the impossibility of a timely opening and the failure to secure other anchor tenants.

Plaintiff's right to build was also contingent. Spokane County expressly conditioned development of the mall on Cafaro and the DOT agreeing on a cost-sharing plan for the required road improvements. No agreement was reached before the Bon withdrew, and the positions of Cafaro and the DOT on the amount for which Cafaro would be responsible remained far apart.

Considering the evidence, any injury suffered by the plaintiff is not close in the chain of causation to any of defendants' acts in pursuing the *West 514* litigation. The contemporaneous documents presented contain nothing indicating the *West 514* litigation, and any delays caused by that litigation, concerned Cafaro or the plaintiff in their plans to develop the mall. On the contrary, there is evidence showing the plaintiff and Cafaro were themselves to blame for certain litigation delays, and intended to develop the mall in spite of the litigation, having

previously faced and overcome similar, more difficult opposition in Puyallup, Washington.

Regarding the fifth factor, there is evidence plaintiff was not an appropriate marketplace competitor. Plaintiff had never previously constructed a mall. Plaintiff also negotiated with numerous development organizations in a constant effort to sell the land. Contemporaneous documents indicate plaintiff did not consider itself a developer, wishing instead to find a buyer who was.

After all the factors have been considered, inquiry into standing is still not complete without determining whether the alleged injury was inextricably intertwined with injury to competition in the relevant markets. *R.C. Dick Geothermal Corp.*, 890 F.2d at 150. It has been questioned whether *McCready* provides an independent basis for standing as apparently indicated by *R.C. Dick Geothermal Corp. In Re Air Passenger Computer Reservation Systems*, 727 F. Supp. 564, 568 (C.D. Cal. 1989).

McCready was decided prior to, and is cited by, *AGC*, which in turn forms the basis of the leading en banc decision in *R.C. Dick Geothermal*. *AGC* was aware of *McCready*, but does not include the "inextricably intertwined" test as a distinct factor. Further, the directness of the injury factor is substantially similar to this test.

Assuming *McCready* does provide a distinct test to be applied after the five factors of *R.C. Dick Geothermal* are considered, any injury sustained by plaintiff must be "inextricably intertwined" with defendants' actions in pursuing the *West 514* litigation. As discussed above, plaintiff was unable to secure anchor tenants and failed to

reach a cost-sharing agreement with the DOT. Further, plaintiff was responsible for some of the litigation delay and intended to proceed with the mall in spite of the litigation. Considering the contemporaneous evidence, the failure of the plaintiff's mall project was not inextricably intertwined with defendants' actions.

B: *NOERR-PENNINGTON* AND SHAM LITIGATION

No violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws. *Eastern R. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961). It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. *Noerr*, 365 U.S. at 139. The Sherman Act may not be extended to regulate activities of a political nature simply because those activities have a commercial impact and involve conduct that can be termed unethical. *Noerr*, 365 U.S. at 141.

Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. *Id.* Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. *Id.* The *Noerr-Pennington* philosophy governs the approach of citizens or groups of them to administrative agencies and to courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

There may, however, be situations where such conduct, ostensibly directed toward influencing

governmental action, is a mere sham to cover what is actually an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. *Noerr*, 365 U.S. at 144.

The sham exception of *Noerr* encompasses situations in which persons use the governmental *process* as opposed to the *outcome* of that process as an anti-competitive weapon. *Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1354 (1991). A sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action. *Id.* A sham suit is one that is an abuse of the judicial processes. *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991). The Supreme Court has identified two types of sham activity: "misrepresentations in the adjudicatory process" and the pursuit of "a pattern of baseless, repetitive claims." *Id.*

In the Ninth Circuit, an antitrust plaintiff must make a two-part showing to support a finding of sham: (1) that the suit is baseless -- a legal question; and (2) that the suit was brought as part of an anticompetitive plan external to the underlying litigation -- a question of fact. *Columbia Pictures*, 944 F.2d at 1532.

There is no basis for holding that a suit brought with probable cause in fact or law may be a sham because such a holding would erode the First Amendment right to petition that is the basis for the *Noerr-Pennington* doctrine by imposing the risk of treble damages for initiating a suit based on a well-founded, but untested, legal theory. *Columbia Pictures*, 944 F.2d at 1531. Simply stated, a suit brought with probable cause does not fall within the

sham exception to the *Noerr-Pennington* doctrine. *Columbia Pictures*, 944 F.2d at 1532.

The Sixth Circuit has extended *Noerr-Pennington* protection to a city's efforts to block construction of a sports arena, finding the various legal actions taken by the city in opposing the arena were sufficiently based. The court stated it would avail an antitrust plaintiff nothing to show that the defendant surreptitiously caused a front man to institute a lawsuit against the plaintiff, even if the suit proved to be without merit, absent a showing of clear abuse of process. *Opdyke Investment Company v. City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989).

The court noted that although the state trial court rejected the legal theory on which the underlying litigation was predicated, the court did not treat the theory as frivolous. *Id.* The court was also not presented with any evidence or suggestion of perjury, bribery, or any other such reprehensible practice, ultimately finding the underlying litigation was not sham, notwithstanding that the prosecution of the lawsuit was presumably part of a broader pattern of conduct intended to block construction. *Id.*

The *West 514* litigation challenged the decision of the Spokane Board of County Commissioners affirming the decision of the Hearing Examiner Committee to approve the adoption of a Mitigated Determination of Non-Significance (MDNS) because of a prior Environmental Impact Statement (EIS) prepared for the site for a similar, failed project. The prior EIS was considered sufficient along with the MDNS, and a new or supplemental EIS was not required. As stated before, the *West 514* plaintiffs essentially claimed the Board in adopting the MDNS inadequately considered the potential harmful impact of a

large, regional mall on the aquifer providing fresh water to much of Spokane County, and on downtown Spokane.

A large development over a crucial aquifer is at first blush reason for some concern, and the occasionally disastrous effects of regional malls on urban downtowns have been documented. Though unsuccessful, the *West 514* litigation was sufficiently based to warrant full proceedings from the Spokane County Superior Court and the Washington State Court of Appeals. The Court of Appeals decision is published at 53 Wn. App. 838, 770 P.2d 1065 (1989), and is criticized by some commentators. As a matter of law, the *West 514* litigation was not baseless.

CONCLUSION

It is clear from the exhibits that the plaintiff faced obstacles more serious than any difficulty presented by the *West 514* litigation. The contemporaneous documents emphasize the inability to obtain commitments from qualifying anchor tenants and the lack of an agreement with the DOT. The contemporaneous documents make no mention of problems caused by delay from the litigation, and even indicate some delay was desired by plaintiff and Cafaro. In fact, the exhibits show plaintiff was willing to proceed with the mall project in spite of the litigation if adequate anchor tenants could be secured.

The exhibits also make clear that defendants Harry Magnuson and Orville Barnes did not want the mall constructed. However, the evidence does not indicate their actions violated the plaintiff's rights.

IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment are **GRANTED**.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 10th day of March, 1992.

/s/ Robert J. McNichols
ROBERT J. McNICHOLS
United States District Judge